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SUPREME COURT, U.S.

No. 06-119

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY,

Petitioner,

v.

FRIENDS OF THE EARTH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT FRIENDS OF THE EARTH IN OPPOSITION

HOWARD I. FOX
DAVID S. BARON*
EARTHJUSTICE
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel for Respondent Friends of the Earth
*Counsel of record

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QUESTION PRESENTED

Whether a Clean Water Act mandate for establishment of the "total maximum daily load" is satisfied by setting loads that are annual and seasonal, and that are described by the Environmental Protection Agency (EPA) itself as "non-daily."

RULE 29.6 STATEMENT

Friends of the Earth is a nonprofit corporation organized under the laws of the District of Columbia. Friends of the Earth has no parent corporation, and no publicly held company owns stock in Friends of the Earth.

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COUNTERSTATEMENT

Among the Clean Water Act's "central objectives" is the achievement of water quality standards, *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992), which are established to "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A). For those waterbodies where technology-based controls are inadequate to achieve water quality standards, the Act requires establishment of the "total maximum daily load" of pollutants. § 1313(d)(1)(C). *See Arkansas*, 503 U.S. at 108.

At issue here are EPA decisions approving and establishing loads for the Anacostia River in the District of Columbia, where pollutant discharges deplete oxygen (thus killing fish and other aquatic life) and increase turbidity (thus impairing recreation and shading out aquatic plants). Despite the Act's mandate for the "total maximum daily load," EPA approved and set annual and seasonal loads.

Defending the ensuing court challenge, EPA did not even argue that its loads were "daily," but on the contrary conceded that they are "non-daily." EPA Br. in D.C. Cir. 05-5015 at 28 (emphasis added).[1] According to the agency, Congress did not "cast[] the phrase 'total maximum daily load' into stone," *id.* 33, and that phrase should not be treated as a "sacred signifier." *Id.* 27 (quoting district court).

The court of appeals, however, concluded that EPA "may not fulfill its obligation to establish daily loads by approving non-daily loads," Pet 8a, 446 F.3d at 146, and remanded to the

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[1]http://www.earthjustice.org/library/legal_docs/EPA-DCTMDL-brief.pdf.

district court with instructions to vacate EPA's approvals. Pet. 12a, 446 F.3d at 148.

EPA has not petitioned this Court for a writ of certiorari. Instead, the pending petition was filed by the District of Columbia Water and Sewer Authority (WASA), which intervened as a defendant in the district court.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS RESPECTED THE CLEAN WATER ACT AND THIS COURT'S PRECEDENT.

Plain meaning of statute. The court of appeals recognized that, under this Court's seminal *Chevron* decision, "if 'Congress has directly spoken to the precise question at issue ..., that is the end of the matter.'" Pet. 5a, 446 F.3d at 144 (quoting *Chevron USA v. NRDC*, 467 U.S. 837, 842 (1984)). Respecting this framework, the court correctly—and unremarkably—concluded that Congress, "by using the word 'daily,' settled the question of what period a 'total maximum load' should cover." Pet. 7a, 446 F.3d at 145.

The suggestion that the court of appeals should have deferred to EPA's interpretation (Pet. 11-12, Br. Amici Curiae of Natl. Assn. of Clean Water Agencies, *et al.*, (NACWA) at 7 n.7) is unavailing. EPA did not claim that the challenged loads fit within any possible meaning of the phrase "total maximum daily load," on the contrary conceding (as noted above) that they are "non-daily." Whatever deference EPA may receive when it interprets statutory language, none is due where it abrogates that language. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (Congress "did not delegate authority" to the agency to act "in a manner inconsistent with the statute. In the context of an unambiguous statute, we need not

contemplate deferring to the agency's interpretation."); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999), *cited in* Pet. 12 (an agency's interpretational discretion extends only to "those cases not covered by the statute's specific terms") (emphasis added).

Statutory context. WASA cites the principle that statutory language should be read in context (Pet. 11; NACWA Br. 13-15, 18), but that principle strongly supports the court of appeals' ruling in at least two ways.

First, § 1313(d)(1)(C) provides for establishment of "the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation." (Emphasis added.) Section 1314(a)(2) in turn provides for the identification of pollutants suitable for "maximum daily load measurement." § 1314(a)(2)(D) (emphasis added). Thus, §1314(a)(2) confirms that maximum loads under §1313(d)(1)(C) are to be daily, not annual or seasonal.

Second, § 1313(d)(1)(C) requires that the "total maximum daily load" "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations." (Emphasis added.) Thus, Congress knew the difference between "daily" and "seasonal." Its decision to require a "daily" load—rather than a seasonal or annual one—must be given effect.

Amendment by implication. Although section 1313(d)(1)(C) was enacted in 1972 and has not been amended since, WASA relies heavily on a 2000 amendment to a different section. Pet. 12-15 (citing § 1342(q)). That amendment neither amends nor even references § 1313(d)(1)(C).

Nor is there any basis for finding an implied amendment. *See United States v. Welden*, 377 U.S. 95, 102 n. 12 (1964) ("Amendments by implication, like repeals by implication, are not favored."). Section 1342(q) breathes not a word about total maximum daily loads, instead addressing "permit[s], order[s], or decree[s]." § 1342(q)(1). Moreover, § 1342(q) references a 1994 EPA Combined Sewer Overflow (CSO) Control Policy, which in turn reaffirms the need to achieve "compliance with the requirements of the CWA," 59 Fed. Reg. 18691 col. 2 (April 19, 1994), and indeed expressly envisions a "total maximum daily load" as a means of ensuring that CSO discharges meet water quality standards. *Id.* 18693 col. 1 (emphasis added). Thus the court of appeals properly rejected WASA's reliance on this provision. *See* Pet 11a, 446 F.3d at 147.[2]

Absurd results. There is no merit to WASA's argument that the statutory requirement for a "total maximum daily load" produces an absurdity. Contrary to WASA's claim, Pet. 21, the court of appeals properly placed the burden on the proponents of the absurd-results argument to make a strong showing. *See, e.g., Conn. Natl. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"); *Barnhart*, 534 U.S. at 459 (rejecting absurd-results argument: "the Court rarely invokes such a test to override unambiguous

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[2] Similarly, § 1342(p)(3)(B)—cited at NACWA Br. 15-17—was added to the Act in 1987, and neither amends nor even references § 1313(d)(1)(C). Indeed, § 1342(p)(3)(B) does not even address total maximum daily loads, instead focusing on "[p]ermits for discharges from municipal storm sewers." (Emphasis added). Like § 1342(q), nothing in this provision speaks to the appropriate time frame for use in establishing § 1313(d)(1)(C) loads.

legislation"); *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004); *Dodd v. United States*, 545 U.S. 353, 125 S. Ct. 2478, 2483 (2005). In any event, regardless of how the burden is allocated, the daily-load mandate produces no absurdity. The Act expressly provides for (1) identifying pollutants "suitable for maximum daily load measurement correlated with the achievement of water quality objectives," § 1314(a)(2)(D) (emphasis added), and (2) establishing the "total maximum daily load" for pollutants thus identified. § 1313(d)(1)(C) (emphasis added). If a pollutant is suitable for a daily load—and EPA has determined that "[a]ll pollutants" are suitable, 43 Fed. Reg. 60665 col. 1 (December 28, 1978)—there is no absurdity in establishing such a load.

II. NO REASONS COUNSEL REVIEW BY THIS COURT.

WASA and its amicus offer no good reason warranting this Court's review.

Circuit split. There is no merit in the argument (Pet. 10, 18, 22; NACWA Br. 5-6) that this Court's review is needed to reconcile the decision below with *Natural Resources Defense Council v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). Although *Muszynski* did make the anomalous claim that the Act "does not require T[otal] M[aximum] D[aily] L[oad]s to be expressed in terms of daily loads," *id.* 94 (emphasis added), the Second Circuit decision did not prohibit daily loads. EPA and states thus remain free to establish daily loads—as required by § 1313(d)'s express language, and confirmed by the decision below and a previous opinion of the Seventh Circuit.[3]

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[3] *Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984) ("A TMDL establishes a maximum daily discharge of pollutants into a waterway. A TMDL must be obeyed even if

(... footnote continued next page)

Moreover, the concern that prompted the Second Circuit's divergence from plain meaning—*i.e.*, that some pollutants might not be suitable for "daily" loads, *see* 268 F.3d at 98-99—can be addressed if and when appropriate by EPA itself, through rulemaking to amend the § 1314(a)(2)(D) list. *See* § 1314(a)(2) (EPA can "from time to time" revise the list, "after consultation with appropriate Federal and State agencies and other interested persons"); Pet. 9a, 446 F.3d at 146 ("EPA conceded at oral argument that nothing forecloses the agency from reconsidering" the § 1314(a)(2)(D) list).

Impacts of decision below. Despite WASA's and NACWA's speculative assertions to the contrary, no impacts of the decision below justify this Court's review.

First, the prospect that EPA and states will need to refocus their efforts on establishing daily loads instead of longer-term seasonal or annual ones (*see* Pet. 22, NACWA Br. 7-8) is not a "new" requirement imposed by the D.C. Circuit's 2006 decision (*see* NACWA Br. 2-3), but is a three-decade-old requirement of the 1972 Clean Water Act—confirmed over two decades ago by the Seventh Circuit in *Scott*. To the extent that non-daily loads have already been established, they can remain in place while daily loads are being developed. Pet. 12a-13a, 446 F.3d at 148; Order of September 18, 2006 in D.D.C. 04cv92 RMU (at EPA's request, district court stays vacatur of non-daily loads until June 7, 2008, to allow time for development of daily loads).

Second, WASA's and NACWA's claims concerning the cost or feasibility of complying with daily loads (*see* Pet. 18-

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(... footnote continued from previous page)
a monthly allowable average could be achieved in the face of some daily discharges above the TMDL.")(emphasis added).

20, NACWA Br. 8-11, 15-17) are meritless. While confirming the statutory requirement that § 1313(d) loads be "daily," the decision below does not address, much less dictate, the stringency of those daily loads. EPA and states remain free to determine how much pollutant loading a TMDL should allow, as long as the TMDL meets the statutory requirements that it be "daily" and that it "implement the applicable water quality standards." § 1313(d)(1)(C). Thus the court below properly rejected WASA's compliance cost argument concerning combined sewer overflows, because "the tension between the CSO Policy's flexibility and the perceived rigidity of daily loads exists only if daily loads must of necessity be set so low that any storm-event discharge would violate them—a premise unsupported anywhere in the record." Pet. 11a, 446 F.3d at 147. The same fatal flaw characterizes WASA's and NACWA's arguments concerning alleged compliance costs of daily loads for waterbodies and pollutants other than the ones at issue below.[4]

NACWA's new arguments. Amicus NACWA advances two new arguments that were not briefed below (NACWA Br. Parts I.C. and III), and thus are foreclosed here. *See, e.g.*,

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[4] In addition to the fundamental error noted in the text, WASA and NACWA make numerous other incorrect assertions. For example, NACWA contends (at 10-11) that daily loads are in tension with a 2004 EPA memorandum on the Chesapeake Bay, but that memorandum addresses permits, not TMDLs. Hanlon/Capacasa Mem. at 1. Moreover, the memorandum expressly cautions that where a wasteload allocation for a given waterbody (*i.e.*, the point-source component of a TMDL, *see* 40 C.F.R. § 130.2(h) and (i)) is expressed "on a shorter term basis" such as "daily," permit limits must comply with that shorter-term load. Hanlon/Capacasa Mem. at 2.

EEOC v. FLRA, 476 U.S. 19, 24 (1986); *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). In any event, the arguments do not warrant this Court's review. First, NACWA claims (at 11-13) that removal of pollutants from the § 1314(a)(2) list would harm cleanup efforts. But EPA has not removed any pollutants from the list, and may never do so. *See* NACWA Br. 4-5 n.4 (three months after the court of appeals decision, EPA told the district court that it has no intention of revising the § 1314(a)(2) list). Second, contrary to NACWA's assertion (at 19), EPA never found that "proper technical conditions did not exist" to support development of daily loads here. Indeed, EPA could not have made such a finding, because daily loads were in fact developed here—but were then discarded in favor of longer-term annual and seasonal loads. *See* 346 F. Supp. 2d at 197 (discussing the computer model used to develop the loads at issue here, district court confirmed that "inputs into the model include only daily values, not average annual ones"). Because EPA did not rely on NACWA's theory, that theory cannot save the decisions under review. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 93-95 (1943); *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: November 24, 2006.

Respectfully submitted,

HOWARD I. FOX
DAVID S. BARON*
EARTHJUSTICE
1625 Massachusetts Avenue, N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel for Respondent Friends of the Earth
*Counsel of record